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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Promotion of Competitive Networks	)	WT Docket No. 99-217
in Local Telecommunications Markets	)	
	)	
	)	

COMMENTS OF THE CITY OF RICHMOND, VIRGINIA ON THE NOTICE OF INQUIRY ON ACCESS TO PUBLIC RIGHTS-OF-WAY AND FRANCHISE FEES

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SUMMARY

The City of Richmond, Virginia appreciates the competition in the provision of telecommunications service brought on by the Telecommunications Act of 1996 (the "Act"), and the resulting benefits to consumers from this dynamic new marketplace. However, this proliferation of competition – and the installation of facilities and equipment in the City's rights-of-way that it has led to – makes it imperative that the City retain its historical authority to protect its public assets.

Congress specifically recognized the importance of local autonomy in this regard in enacting Section 253 of the Act. Thus, Section 253(c) creates a "safe harbor" that confirms the ability of a local government to manage its public rights-of-way and obtain fair and reasonable compensation for the use thereof. Moreover, this subsection ensures that local governments can seek rent for the use of their property in whatever manner is best tailored to the specific needs of their jurisdiction, provided they do so in a competitively neutral and nondiscriminatory manner. For example, in Virginia, the legislature has enacted a state-wide compensation formula that local jurisdictions may, if they choose, elect to adopt by ordinance.

The "competitively neutral and nondiscriminatory" qualifier, however, does not mandate that all providers be treated alike. It requires only that similarly situated providers be treated in a similar manner to one another. This pragmatic rule allows local governments to tailor their ordinances and franchise requirements to acknowledge the substantial differences among incumbent carriers (who are, generally, historical monopoly providers of universal service) and the array of competitive providers (who

vary widely in technology, the degree to which they use their own facilities and the customers that they intend to serve) in each jurisdiction.

In managing its rights-of way, the City must be able to condition access to public property on a carrier's agreement to reasonable conditions within the scope of the City's authority. To the extent that any court decision has indicated that the types of lawful conditions that the City seeks to require are beyond the scope of Section 253(c), such decision is wrong. Even if the conditions imposed by the City were outside of Section 253(c)'s "safe harbor," such conditions still would be permissible under Section 253(a), which only proscribes State and local governments from acting so as to prohibit (or have the effect of prohibiting) the provision of telecommunications service.

The Commission should take this opportunity to clarify that Section 253 affords local governments maximum flexibility to address their unique situations on a case-by-case basis, consistent with the goals of the Act.

INTRODUCTION

The City of Richmond, Virginia (the "City") submits these comments in response to the Federal Communications Commission's (the "Commission") Notice of Inquiry with respect to Section 253 of the Telecommunications Act of 1996 (the "Act"), 47 U.S.C. § 253.[1]

The City recognizes and appreciates the telecommunications competition that has been catalyzed by the passage and implementation of the Act, and welcomes the benefits it brings to Richmond. As more and more competitive options emerge in the telecommunications marketplace, the City anticipates that these benefits will increase as well.

Along with these benefits, though, come certain burdens on the public infrastructure. Increased efforts to use public rights-of-way – which, in many cases, involve installing conduit, trenching and cutting streets – inevitably create a heightened impact on the City's rights-of-way. It is therefore crucial that local governments retain sufficient authority to protect public property. Congress understood this, and enacted Section 253 so as to preserve the traditional authority of local governments to manage

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[1] See In re Promotion of Competitive Networks in Local Telecommunications Markets; Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services; Cellular Telecommunications Industry Association Petition for Rule Making and Amendment of the Commission's Rules to Preempt State and Local Imposition of Discriminatory and/or Excessive Taxes and Assessments; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, WT Dkt. No. 99-217, CC Dkt. No. 96-98, Notice of Proposed Rulemaking and Notice of Inquiry in WT Dkt. No. 99-217, and Third Further Notice of Proposed Rulemaking in CC Dkt. No. 96-98 (rel. July 7, 1999).

and administer their rights-of-way and charge fair and reasonable compensation for the use thereof.

The City believes that Section 253 must be interpreted by the Commission so as to preserve the ability of local governments to protect public assets. Specifically, the Commission should focus on at least three issues of critical import to local governments. First, local governments – in some cases working in concert with their respective state governments, and in some cases acting alone – must have considerable discretion in deciding what form of fair and reasonable compensation best suits their local needs, including obtaining rent for the use of their property. Second, the Commission should clarify that the "competitively neutral and nondiscriminatory" requirements of Section 253(c) only mandate that similarly situated providers be treated in a like manner, not that all carriers be treated the same. Third, Section 253 should be construed broadly to allow local governments to determine the most appropriate way to manage and protect the public rights-of-way, in light of local facts and circumstances. To that end, the Commission should confirm that Section 253 does not limit the authority of local governments with respect to public property as long as the exercise of such authority does not prohibit or have the effect of prohibiting the provision of telecommunications services. Each of these issues is explored fully below.

I. Local Governments Are Entitled to Obtain Appropriate Rent As Compensation for the Use of Public Rights-of-Way

Section 253(c) expressly preserves the authority of local (and State) governments "to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government." The Act does not explicitly define "fair and reasonable compensation," which is not surprising since there is not one answer for all localities and there are a multitude of ways in which public rights-of-way may be used. Indeed, the very idea of "fair and reasonable compensation" is, by necessity, one that must be addressed on a jurisdiction-by-jurisdiction basis, in light of the unique circumstances and conditions in each locality. It is crucial for the Commission, however, to make clear that local governments are not precluded from charging rent for the use of their rights-of-way, including a fee calculated on a per-access line basis as is permitted under Virginia law.[2] The Commission should put to rest, once and for all, the claims of some carriers that Section 253 limits compensation to the recovery of out-of-pocket costs.

Compensation for "use," of course, includes, at a minimum, reimbursement for the costs to the local government of having lines or equipment installed in the public rights-of-way. Such items may include the costs of repairing or replacing the streets or other rights-of-way that are excavated, the costs for any government personnel that are needed to ensure that the installation does not endanger public safety, and costs related to acquiring, maintaining and improving the public rights-of-way.

The statute, however, does not limit local governments to reimbursement for their costs. Indeed, there are a host of other "costs" which should be considered, ranging from the additional costs a locality must bear to repair the streets sooner as a result of multiple

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[2] The statutory fee calculation method that localities may elect to participate in under Virginia law is described at pp. 7-8, *supra*.

street cuts that shorten the life of the street, to the costs of accidents and injuries that occur as a result of barriers in streets, or disruptions to normal public crossings and pathways and the disruption to commerce.

In any event, and most importantly, Section 253(c) does not even refer to "costs"; rather, it refers to "compensation," and courts have ruled that this difference is important: "the fact that Congress used the word 'compensation' in lieu of the word 'costs' in [Section 253(c)] is strong evidence against construing the term to limit municipalities to strictly their costs related to telecommunications providers use of their right-of-ways." TCG Detroit v. City of Dearborn, 16 F. Supp.2d 785, 789 (E.D. Mich. 1998) ("Dearborn"). The Dearborn court further elaborated:

> The term "fair and reasonable compensation", although not explicitly defined by Congress, clearly enables a municipality to charge compensation for the use of its right-of-ways as the words "fair and reasonable" are commonly understood. Any determination of whether compensation is "fair and reasonable" is not amenable to a strict test. Rather, fair and reasonable is determined by examining the totality of the facts and circumstances.

Id. (emphasis added). Although "fair and reasonable compensation" cannot be defined precisely, because it requires a case-by-case determination, it is clear that the concept is broader than simply "costs" and can clearly include the value of the use of rights-of-way.

In particular, Section 253(c) preserves the authority of local governments to charge rent for the use of their property.

> [T]here is nothing inappropriate with the city charging compensation, or "rent", for the City owned property that [a telecommunications provider] seeks to appropriate for its private use. The statute specifically allows it. *See* 47 U.S.C. § 253(c) (this section does not affect the authority of the city to "require fair and reasonable compensation from

> telecommunications providers . . . for the use of the public rights-of-way . . . .).

Id.[3]

The Dearborn court, in evaluating the city's compensation scheme, examined four factors to determine whether it was fair and reasonable: (1) the extent or amount of the provider's proposed use of the public rights-of-way; (2) the willingness of other providers to agree to similar terms and conditions; (3) the course of dealings between the parties; and (4) whether the fees were "so excessive that it is likely to render doing business unprofitable". Id. at 790-91 (holding that the ordinance and franchise agreement, including the assessment of a fee based on 4% of gross revenue, do not violate the Act).[4]

The Dearborn court is not alone in acknowledging local government authority under Section 253(c) to obtain compensation beyond mere costs. A federal court in New York recently said that an interpretation of Section 253(c) that restricts local governments to compensation for the costs of maintaining and improving public rights-of-way "may too severely limit" the concept of "fair and reasonable." Omnipoint Communications, Inc. v. The Port Authority of New York and New Jersey, 1999 WL 494120, *6 (S.D.N.Y. July 13, 1999). The Omnipoint court cited the reasoning and four part test of Dearborn,

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[3] As the Dearborn court recognized, over a century ago the United States Supreme Court upheld the right of a municipality to seek rent from a company that sought to place telegraph poles on city land. See Dearborn, 16 F. Supp.2d at 789. (*quoting* City of St. Louis v. Western Union Tel. Co., 148 U.S. 92 (1893) ("Western Union")). The Supreme Court reasoned in Western Union that although there was not a technical landlord-tenant relationship, allowing the erection of telegraph poles on public property amounts to giving "'use of real estate, for which the giver has a right to exact compensation, which is in the nature of rental.'" Id. (*quoting* Western Union, *supra*, 147 U.S. at 99)). The same result applies today.

[4] Although it approved the particular compensation mechanism employed by Dearborn, MI, the Dearborn court did not suggest even remotely that that this method was the only legally acceptable means for local governments to obtain compensation for the use of their public property.

but decided that it need not decide the issue due to the procedural posture of the case. Id. at *7.[5]

At least one federal court has taken a contrary view – that compensation equates to costs. A federal court in Maryland (which was considering a franchise fee based on 3% of gross revenue) held that "any franchise fees that local governments impose on telecommunications companies must be directly related to the companies' use of the local rights-of-way, otherwise the fees constitute an unlawful economic barrier to entry under section 253(a)." Bell Atlantic-Maryland, Inc. v. Prince George's County, Maryland, ___F. Supp.2d ___, 1999 WL 343646 *10 (D. Md. May 24,1999) ("Prince George's"). The Court further indicated that "[f]ranchise fees . . . may not serve as general revenue-raising measures." Id. The Court explained its reasoning as follows:

> The appropriate benchmark is not the "value" of [the company's] "privilege of using the County's public rights-of-way to provide telecommunications services in [the] County. Rather, the proper benchmark is the cost to the County of maintaining and improving the public rights-of-way that [the Company] actually uses. Furthermore, to be "fair and reasonable," these costs must be apportioned to [the Company] based on its degree of use, not its overall level of profitability.

Id. at *11.[6]

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[5] Similarly, in AT&T Communications of the Southwest, Inc. v. City of Dallas, 8 F. Supp.2d 582, 593 (N.D. Tex. 1998) ("Dallas I"), while the Court held that Dallas' imposition of a franchise fee based on 4% of gross revenue violated the Act, it expressly refrained from defining the scope of reasonable compensation. Id. Rather, the Court focused on the inclusion of revenue derived from long-distance services (which, evidently, could not be included as a matter of Texas state law) and from resale. Id. The Court did not, however, question Dallas' ability to charge fair and reasonable compensation that included more than costs.

[6] The Prince George's court specifically disagreed with the interpretation adopted in Dearborn, *supra*. See Prince George's, 1999 WL 343646 at *11, n. 27.

The Commission should make clear that the analysis in Prince George's is wrong. There simply is no support in the statute for limiting "fair and reasonable compensation" to the costs incurred in maintaining and improving the public rights-of-way. Had Congress meant to so limit a municipality's authority it could have done so. Instead, Congress clearly provided that local governments retain their historical authority to be compensated for the use of their property by charging rent.

Once it is determined that "fair and reasonable compensation" includes rent for the use of public rights-of-way, the next question is how should local governments calculate that compensation? Various options exist, such as charging on a per linear foot basis, charging based on the number of access lines served by a particular carrier, or charging the telecommunications provider a percentage of its gross revenue generated by the facilities and equipment occupying the public rights-of-way. Tellingly, Congress did not dictate any particular methodology in the Act. This is because the decision of how to compensate the local government is an inherently local question that will vary based on the unique situations in each jurisdiction. Thus, it is imperative that local governments have the flexibility to develop appropriate compensation mechanisms.

In Virginia, the State has enacted a statute entitled "Public Rights-Of-Way Use Fee." See VA. CODE. ANN. § 56-468.1 (1999).[7] This statute authorizes local governments that elect to adopt the Public Rights-Of-Way Use Fee by ordinance to obtain compensation from telecommunications providers for the use of their public

[7] The Virginia statute reflects a compromise between local governments and telecommunications providers that was the product of negotiations between industry and government representatives during the 1998 session of the Virginia General Assembly.

rights-of-way based on a formula. The formula multiplies the number of public highway miles in Virginia by a defined mileage rate, adds the number of feet of new installations in Virginia (multiplied by $1 per foot), and divides this sum by the total number of access lines in the Commonwealth. The monthly rate is calculated by dividing this number by twelve. See id. at § 56-468.1(D). Telecommunications providers are obligated to collect these fees from end-users (*i.e.*, from each access line they serve) and hold the sum in trust for eventual remittance to the local governments. See id. at § 56-468.1(G). This method is particularly attractive because it is easy to use and it encompasses both the costs of maintaining and improving public rights-of-way and a rental fee for the use of local government property. Moreover, it has the benefit of offering a degree of uniformity and predictability throughout Virginia. While this method may work in Virginia – and is well within the letter and spirit of Section 253 – that does not make it right for all jurisdictions. There simply is no "one way" for local governments to be fairly compensated for the use of their property.

Because no uniform historical method of compensation had evolved with respect to use of rights-of-way by telecommunications providers, the Act does not proscribe (or prescribe) any given method of compensation. Since Section 253(c) is directed to preserving local authority over public rights-of-way, the most sensible interpretation of the Act is to afford local governments maximum flexibility in crafting reasonable and lawful methods of compensation. The only limitation on fair and reasonable compensation is whether a fee is so high as to prohibit or have the effect of prohibiting entry.

II. Section 253(c) Does Not Require That A Local Government Treat All Carriers Identically

As noted, Section 253(c) requires local governments to act in a "competitively neutral and nondiscriminatory" manner. It does not, however, require that all telecommunications providers be treated alike – or that they all pay the same compensation for using rights-of-way. Local governments are confronted with an array of different carriers engaging in different activities, and they need the flexibility to take these differences into account.

This construction of Section 253(c) is confirmed by reference to the Act's legislative history. Representative Stupak, whose amendment rejected the use of a "parity" standard as the guidepost for local government authority, stated:

> Local governments must be able to distinguish between different telecommunications providers . . . . The manager's amendment states that local governments would have to charge the same fee to every company, regardless of how much or how little they use the right-of-way or rip up our streets.

141 Cong. Rec. for August 4, 1995 at H 8460. The House ultimately rejected the described "parity" standard, as reflected in the final language of Section 253(c).

Courts considering Section 253(c) also have recognized that it does not demand equal treatment among all providers. In Dearborn, the court held that "the explicit language of the statute does not require such strict equality. All that is required is that the compensation sought be non-discriminatory and competitively neutral." Dearborn, 13 F. Supp.2d at 792. Similarly, in Dallas I, the court held that "being competitively neutral does not require cities to treat all providers identically and to ignore the significant distinctions among them. The most important and relevant distinction in this context is the different amounts of City rights-of-way that each company uses to provide its services." 8 F. Supp.2d at 593-594. The Commission, too, has suggested that Section 253(c) allows local governments to consider whether different providers are similarly situated in deciding how to treat them. "At the very least, this mandate of competitive neutrality requires Cities to treat similarly situated entities in the same manner." In re Classic Telephone, Inc., Memorandum Opinion and Order, 11 FCC Rcd. 13,082, ¶ 37 (1996).

Not only is this interpretation consistent with Congress' intent, but it also reflects the reality of the dynamic telecommunications market. Different providers, in the same jurisdiction, will offer different packages of services. For example, unlike the incumbent carriers, many carriers do not offer universal telephone service to each household in the municipalities they serve. In addition, a number of competitive providers seek access to public rights-of-way only in high-volume commercial areas, while others plan to offer residential service. There simply is no basis, statutory or otherwise, to require that the City treat all of these entities the same.

Local governments must be able to recognize differences among different types of carriers because, historically, the Bell System (and, by inheritance, its progeny) enjoyed access to public property commensurate with their commitment to develop a ubiquitous telecommunications network that benefited all Virginians. The current environment, in which multiple telecommunications providers are building their own networks designed principally to serve large business customers who now have competitive choices, is very different. Today's new telecommunications providers, however, claim that they are entitled to be treated identically to former monopoly providers who served the overwhelming majority of residential subscribers. This claim has no foundation in Section 253 and, as a practical matter, makes no sense. The historical relationship between local governments and a monopoly provider developing the first telephone systems for broad public use is no model for the appropriate treatment of telecommunications providers who are vying in a competitive marketplace to serve selected, high-end customers. Nothing in the Act suggests that local governments should be prevented from taking appropriate action – including obtaining appropriate compensation – with respect to this generation of carriers. Simply put, these telecommunications carriers are not similarly situated to traditional monopoly providers, and treating them differently does not violate the Act's directive for "competitively neutral and nondiscriminatory treatment."

The Commission should state unequivocally that Section 253(c) requires local governments to treat similarly situated telecommunications providers in a "competitively neutral and nondiscriminatory" manner; it does not require that all providers be treated identically. When providers offer different services as compared with other providers, local governments must maintain the flexibility to create reasonable regulatory schemes that address the particular issues raised by that service offering and its impact on the local government's property and constituents.

III. <u>Section 253 Preserves Substantial Authority for Local Government</u>

Section 253 seeks to ensure that state and local governments do not become entry barriers to companies seeking to provide telecommunications services. Thus, Section 253(a) proscribes practices that prohibit, or have the effect of prohibiting, the provision of telecommunications services. It does not, though, restrict the ability of local governments to craft ordinances and franchise requirements that are responsive to, and reflective of, their community's individualized needs.

The City may, for example, choose to include some or all of the following types of provisions in an ordinance authorizing a franchise for the provision of telecommunications services in Richmond: a non-exclusivity clause; a reservation of the City's right to perform public works or improvements, and a corresponding obligation on a provider to remove any equipment that interferes with such projects; the right to obtain fair and reasonable compensation, including rent, for the use of public property; construction quality assurances; limitations of liability for the City and its employees and agents; a requirement for non-interference with the operations of other telecommunications providers; requisite safety precautions; compliance with local laws and regulations; compliance with permitting procedures; periodic reporting obligations with respect to compliance with the ordinance; the City's right to inspection of books and records, including those sufficient to demonstrate compliance with fee requirements; the provision of installation and construction information; insurance and indemnification requirements; the posting of a surety bond; and, the City's right to consent to transfers of control of the telecommunications provider. The foregoing list is intended to be illustrative, not comprehensive or exclusive. These are merely certain types of provisions that the City might require in exchange for granting a franchise.

The City believes that each of the types of provisions or subject areas listed above is properly within its management authority preserved by Section 253(c). To the extent any court case interprets Section 253(c) differently, that case is wrong. For example, the court in Prince George's suggested that a local government's request for financial information may be beyond the scope of its authority because such a request somehow "prohibits" entry into the marketplace. See Prince George's, 1999 WL 343646 at *8. That interpretation is inconsistent with the law and the facts. Surely, the City must have the right to determine whether a carrier is financially capable of complying with such reasonable City requirements as obtaining bonds and insurance, repairing damage caused to the streets and surface structures and relocating parts of the system when necessary or appropriate. It is inconceivable that the City would have to permit a company on the verge of bankruptcy, or a company that has repeatedly failed in other jurisdictions to comply with repair or construction obligations, to cut its streets. Indeed, the City believes it would fail in its fiduciary obligation to protect the public, if it did not ensure that a company does not pose an undue risk to the daily functioning of the City and the health, safety and welfare of the public. Congress surely did not intend that result.

The Commission should clarify that Section 253(c) gives franchising authorities sufficient flexibility to protect their rights-of-way as they deem most appropriate under the prevailing facts and circumstances. The Commission should resist the narrow reading of Section 253(c) adopted by some courts that would restrict a local franchising authority's ability to determine from a range of reasonable options the best way to protect and preserve public assets.[8] Local conditions vary, and local governments need to be

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[8] For example, one jurisdiction may seek little or no financial information but may require significant amounts of insurance, bonds or security funds. Another jurisdiction may choose to limit such requirements if they have other financial assurances, such as guarantees or reliable financial information. Jurisdictions must be able to choose the approach that best protects legitimate local interests.

able to take those conditions into consideration when fashioning appropriate local franchising requirements.

While the City believes that Section 253(c) encompasses the provisions and activities described above, the City further believes that such provisions and activities are also clearly permitted under Section 253(a). Section 253(a) establishes the legal boundary of state and local authority in this area. Section 253(c) creates a "safe harbor" for local government action. Nothing in the Act, however, suggests that Section 253(c) articulates the full extent of local authority. Thus, the City, if it determined that it was appropriate to do so and permissible under law, could go beyond the types of provisions described above as long as such additional provisions do not prohibit or have the effect of prohibiting market entry under Section 253(a).

Unfortunately, some recent court decisions have misconstrued Section 253 by narrowly restricting local governments to the matters in subpart (c).[9] While we agree that local governments should not duplicate the work of state public utility commissions,[10] these decisions have read Section 253(c) far too narrowly. Indeed, this reading of the Act conflicts with the plain language of Section 253(a) – the only subsection that affirmatively limits the authority of local governments. That section does not contain a

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[9] For example, one court found that certain requirements in franchise applications were invalid because they were "totally unrelated to use of the city's rights-of-way and thus are beyond the scope of the City's authority." Dallas I, 8 F. Supp.2d at 593. Similarly, the Prince George's court found that the franchise provisions at issue "attempts to regulate telecommunications companies in ways that exceed the County's allowable authority 'to manage the public rights of way.'" Prince George's, 1999 WL 343646 at *9.

[10] See In re TCI Cablevision of Oakland County, Inc., Memorandum Opinion and Order, 12 FCC Rcd. 21,396, ¶ 104 (1997) ("Our concern is that some localities appear to be reaching beyond traditional rights-of-way matters and seeking to impose a redundant 'third tier' of telecommunications regulations which aspires to govern the relationships among telecommunications providers, or the rates, terms and conditions under which telecommunication service is offered to the public.").

broad-based ban on local government action; rather it bars regulations or requirements that "prohibit or have the effect of prohibiting" an entity from providing telecommunications services. Thus, any local requirements, including, but not limited to, those relating to managing rights-of-way and obtaining compensation, are permissible so long as they do not actually or effectively prohibit carriers from providing service.

In sum, the Commission should clarify that Section 253 is not to be narrowly construed, but rather interpreted to give local governments sufficient flexibility to protect public rights-of-way in the manner they deem most appropriate in light of local facts and circumstances. Further, the Commission should clarify that while Section 253(c) is a "safe harbor" of clearly permissible local authority, Section 253(a) establishes the legal test for defining the full scope of local authority with respect to the use of public rights-of-way.

CONCLUSION

In an effort to strike an appropriate balance between the Act's twin aims of promoting a competitive telecommunications market and preserving traditional local government authority, and for all of the reasons set forth in the foregoing sections, the City respectfully requests that the Commission adopt the interpretations of Section 253 of the Act set forth herein.

Dated: August 13, 1999.

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